

ESTATE OF TENIE TEANIE LENA JACK WAGON HILL REYES

IBIA 75-43

Decided October 17, 1975

Appeal from an Administrative Law Judge's decision denying petition to reopen.

Reversed and Remanded.

1. Indian Probate: Notice of Hearing: Generally

It is incumbent upon one claiming lack of notice of a hearing by the Interior Department to determine heirs of a deceased allottee to make a showing of such lack.

APPEARANCES: Steven M. Avery of the Wind River Legal Services, Inc., for appellant, Bernice Grace Wagon Duran Starr.

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON

This appeal filed by Bernice Grace Wagon Duran Starr, hereinafter referred to as appellant, through her attorney, Steven M. Avery, is from an Order Denying Petition to Reopen made and entered on November 15, 1974, by Administrative Law Judge William E. Hammett.

Tenie Teanie Lena Jack Wagon Hill Reyes, hereinafter referred to as decedent, an unallotted Washakie Utah Shoshone, died intestate on September 25, 1970, leaving trust property in both the Fort Hall Reservation in Idaho and the Wind River Reservation in Wyoming. A hearing to determine the decedent's heirs was held and concluded July 7, 1971, by Administrative Law Judge William E. Hammett. Thereafter, on November 2, 1971, an order determining the heirs was made and entered by Judge Hammett. In the order of November 2, 1971, supra, Pete Reyes, a non-Indian, was found to be the surviving spouse and entitled to an undivided one-half as to the Wyoming property and one-third as to the property in Idaho.

On September 18 and 25, 1972, petitions for rehearing were filed in the matter. Thereafter, on October 2, 1972, the Judge denied the petitions. On October 29, 1974, a Petition to Reopen was filed by the appellant Bernice Starr, Lydia Wagon Timbana, Ralph Wagon, and Floyd Wagon. In support of their petition the following allegations were made:

(a) That the appellant herein did not receive actual notice of the hearing nor was she in the vicinity of the Wind River Reservation during the time of posting of the notices of hearing.

(b) Disclaimer of marital status by Pete Reyes, purported common-law husband of decedent.

(c) That the disclaimer controverted the Montana Common-Law Marriage statute.

(d) That Reyes did not prove his marriage by clear and convincing proof.

The Judge on November 15, 1974, denied the petition to reopen giving the following reasons in support thereof:

(a) That there was presumptive evidence that she was aware of the order issued on November 2, 1971, wherein her mailing address was given as Crowheart, Wyoming.

(b) That the purported disclaimer by Reyes would not have invalidated, per se, a previously valid common-law marriage.

(c) That a common-law marriage between the decedent and Pete Reyes was established by clear and convincing evidence.

It is from the decision of November 15, 1974, that the appellant has appealed to this Board.

The appellant bases her appeal on the following contentions:

- (1) that she had standing to file a Petition to Reopen Estate, and
- (2) that proof of marriage is lacking in the relationship between decedent and Pete Reyes, purported common-law husband of decedent.

Pertinent and relevant part of 43 CFR 4.242(a) under which the appellant bases her first contention provides:

(a) Within a period of 3 years from the date of a final decision issued by an Administrative Law Judge * * * any person claiming an interest in the estate who had no actual notice of the original proceedings and who was not on the reservation or otherwise in the vicinity at any time while the public notices of the hearing were posted may file a petition in writing for reopening of the case. * * *

There appears to be no question that the appellant had standing to file a petition to reopen under the foregoing provisions of 43 CFR 4.242. The affidavit filed by appellant in support of her petition to reopen stated, "I, the undersigned, do solemnly swear and affirm under oath that I did not receive actual notice of the original proceedings and was not in the vicinity of the Wind River Reservation of Wyoming while the public notices of the hearing were posted." Although the exact

whereabouts of the appellant during that time is not required by the above-cited provisions of the code, she volunteered the information in her brief to the effect that she and her family were in the State of Oregon at that time. The Administrative Law Judge's own admission that the Notice of Hearing dated June 4, 1971, the Order Determining Heirs dated November 2, 1971, and the Order Nunc Pro Tunc dated November 5, 1971, which were sent to the appellant at her address at Crowheart, Wyoming, were returned undelivered appear to support her contention. The Administrative Law Judge's finding to the effect that appellant's Crowheart, Wyoming, address on her petition for rehearing filed September 25, 1972, was presumptive evidence that she was aware of the order which was issued November 2, 1971, is immaterial in that it does not address itself to the question of actual or public notice of the original proceedings.

This Board in the Estate of Frank Jones, 1 IBIA 345, 79 I.D. 697, 700 (1972), in considering the question of lack of notice held:

[1] * * * It is incumbent upon one claiming lack of notice of a hearing by the Interior Department to determine heirs of a deceased allottee to make a showing of such lack. * * *

Considering the appellant's contention against the case above cited, we find that she has shown satisfactorily the lack of notice

and that her petition for reopening should be granted and the matter remanded to the Administrative Law Judge for further proceedings.

As for the appellant's second contention regarding the validity of the purported common-law marriage of the decedent and Pete Reyes, this Board finds it unnecessary to consider the same at this time since the appellant will have ample opportunity to raise that issue whenever the matter is set for further proceedings by the Administrative Law Judge.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Administrative Law Judge's Order Denying Petition to Reopen dated November 15, 1974, is hereby REVERSED and the matter is REMANDED to the Administrative Law Judge for the purpose of conducting a rehearing and for the issuance of a decision based upon the evidence presented during said proceedings.

Done at Arlington, Virginia.

Alexander H. Wilson
Chief Administrative Judge

I concur:

Mitchell J. Sabagh
Administrative Judge